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in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1414

ANDY ANDREAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

The Petitioner ANDY ANDREAS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in these proceedings on April 11th, 1972.

PRELIMINARY STATEMENTS

ANDY ANDREAS, petitions for certiorari from a judgment of conviction entered on judgment on May 25th, 1971, in the United States District Court of the Western District of Missouri, after two trials before the Honorable William R. Collinson, United States District Judge, and a jury, and affirmed by the 8th Circuit Court of Appeals.

On indictment filed October 2nd, 1970, defendant appellant was charged with mail fraud by devising a scheme and artifice to defraud in violation of 18 U.S.C. Section 1341 and 1343.

On June 18th, 1971, after a pre-sentence investigation the defendant-appellant was sentenced to two years of imprisonment on Counts I, II, and III, sentences to run concurrently. On the remaining five counts the imposition of sentence was suspended and the defendant-appellant was placed on two years probation on each of these counts, to commence on the expiration of the term of imprisonment. Petitioner appealed to the 8th Circuit Court of Appeals which affirmed.

II. STATEMENT OF FACTS

BEFORE the actual trial commenced, defendant-appellant filed a Motion to Dismiss the indictment, on the grounds that the statute of limitation had elapsed.

During the course of the trial the defendant-appellant through his attorney, made a Motion to dismissal to the Court, on the grounds that a warrant for the arrest of the defendant was never issued, nor executed. (T-103). The Court having denied said motion. (T.-104-105).

The government brought to the stand several witnesses in order to try to prove its case against the defendant-appellant.

The first witness to take the stand was Mr. John E. Flick, and Mr. Flick's testimony consisted in essence of his negotiations with the defendant-appellant in regard to the sale of certain planes.

He testified that he met the defendant-appellant sometime in 1965, (Tr. 65), in Washington, D.C., afterwards both in letters and in conversation personally the defendant-appellant made known to him that he had these Navion Aircrafts for sale.

He testified that defendant-appellant would sell them to him for $1,600.00 (one thousand six hundred dollars), (Tr. 67), and he further testified that in fact he gave the defendant appellant a check for $1,600.00 and that he was familiar with the defendant-appellant's handwriting, and then proceeded to identify Government's Exhibit 9, and 10 and also 11 for identification and for admission into evidence, which consisted respectively of a letter from the defendant-appellant to the witness, a check for the amount of $1,600.00, endorsed by the defendant-appellant and a second letter from the defendant-appellant to the witness. (Tr. 67-74).

He then proceeded to identify Government's Exhibit No. 12, and Government's Exhibit No. 2, all of which were admitted in evidence, (Tr. 75-80), which were letters from the defendant-appellant to the witness in regard to the sale of the aircraft. Then the witness in above cause,

proceeded to identify Government's Exhibit No.'s 13, 14, 5 and 3, and also 16, all of which were admitted to evidence, consisting of letters from the defendant-appellant, to the witness also regarding the alleged transaction.

He also testified and identified Government's Exhibit No. 15, consisting of a telegram which the defendant-appellant sent to the witness, but it was excluded, (Tr. 87), since it was signed with the name Santa Claus. The witness testified that all these letters were received through the U.S. mail from several places.

The next witness was GEORGE FRANKLIN BANKS, and Mr. Banks testified that he had become acquainted with Mr. Flick through the Experimental Aircrafts Club, of which both were members, (Tr. 107), who gave him the name and address and telephone number of the defendant-appellant in Kansas City, Missouri. He testified that he called the defendant-appellant and agreed to buy from him an aircraft for the amount of $3,400.00, and that he sent a bank draft for the amount of $500.00 to the defendant-appellant in order to start the purchase of the aircraft, (Tr. 108), he also testified that he received several telegrams from the defendant-appellant and that he paid the whole sum of $3,400.00, and that he never received the airplane from the defendant-appellant (T-109).

He further testified that after numerous telephone calls and letters to the defendant appellant, all of which went unanswered, he came to Kansas City, Mo., to see if he could find the defendant appellant, (T-120), and not being able to locate him, he notified the Postal Authorities in Kansas City, Mo., sometime in July, 1966.

The defendant-appellant took the stand in his own behalf, and he testified that the post office during the past five years, knew all the time where he was, and how he could be reached since in spite of all the moving around as he always left a forwarding address, (T-171).

He also testified that a postal inspector by the name of Marino, came to him to see him in the fall of 1967, in Puerto Rico, (T-171), and that another inspector by the name of Rose tried to contact him in the fall of 1967, in California, (T-172). Also that a third postal inspector Mr. Caldwell, saw him on June 2nd, 1970, in Fort Myers, Florida.

At the end of the Government's case, the defendant-appellant through his attorney, made a Motion for a Verdict of Acquittal, on the grounds of unnecessary delay prior to commencement of prosecuting, under the right to a speedy trial as guaranteed to the defendant by the Sixth Amendment to the Constitution. (T-157-157-A).

The Court held ruling on the said Motion, until all the evidence was heard, however, there is no reference in the transcript as to what the Court's ruling was. (T-158). Nevertheless it is obvious that the Court implicitly denied the motion.

ARGUMENT

POINT I

DID THE TRIAL COURT AND THE APPELLATE COURT COMMIT ERROR IN ITS DENIAL IN DEFENDANT-APPELLANT'S MOTION TO DISMISS ON THE GROUNDS THAT THE STATUTE OF LIMITATION HAD ELAPSED?

The indictment against the defendant-appellant alleges that beginning on or about the 15th day of August, 1965, and continuing to on or about April 18th, 1966, the defendant devised and intended to devise a scheme artifice to defraud and to obtain money by means of false and fraudulent pretenses, with presentations, and promises from John E. Flick and George F. Banks.

The indictment was filed on October 2nd, 1970. It is the position of the defendant-appellant that the statutes of limitation, of five years which definitely applied to violations of the mail fraud loss are a bar to the prosecution of the defendant-appellant under this indictment since the alleged violation began to take place more than five years before, to wit: August 15th, 1965.

The defendant appellant is well aware that the statutes upon which this indictment was founded specifically made the act of placing a letter in the mail, or causing an interestate telegram to be sent in furtherance of the scheme to defraud a specific crime. And in accordance are most if not all of the jurisdictions. However, the defendant appellant most vigorously prays to this Honorable Court, to re-examine, the construction and interpretation of the said statutes.

The defendant contends that this interpretation and construction of the statutes is wholly and completely unwarranted and mistaken. First, a criminal statute because of its penal nature, must be given a most strict, and limited construction, against those who are responsible to enforce it. Defendant contends that this strict and limited construction is founded on the most sound legal reasoning and principals, and that at the same time, a criminal Statutes of Limitation demands the most liberal and broad construction in favor of the accused.

In the case here for review, the opposite is the case, and even though the construction and results reached, by the United States Court of Appeals, for the Eighth Circuit, are in accordance with what appears to be the settled interpretation of the law in the land.

The defendant urges this Court to re-examine the statute in question, specifically the interpretation given in U.S.C. Sec. 1341 and 1343. The statute charges a scheme, which by nature is not restricted nor limited to a single act but on the contrary, it explicitly implies a series of events, acts and or continuing violations. The Court in dening the motion states that each act is in itself a specific crime, a specific violation, for which the defendant can be convicted. However, the wording in the indictment reads a scheme, not a single act. How then can the defendant be convicted for a single violation if the defendant is to be convicted, he has to be convicted, he has to be convicted for the whole scheme, otherwise, we will have a case where he is charged with one crime, and convicted of another.

The defendant-appellant submits that since a scheme is a connected combination of things, for the attainment of certain end, or plan, if part of said combination of things falls beyond the limit, prescribed by the statutes of limitation the whole scheme is then outside of the reach of the prosecution.

The result otherwise could lead to the case being where such a scheme could extend over an unlimited and unreasonable period to time, and a person could be accused and convicted of crimes that might have been committed fifteen or twenty years before he is brought to trial.

POINT II

WHETHER OR NOT IT WAS ERROR FOR THE DISTRICT COURT TO DENY DEFENDANT-APPELLANT'S MOTION FOR A DIRECT VERDICT OF ACQUITTAL, ON THE GROUNDS OF UNNECESSARY DELAY, PRIOR TO COMMENCEMENT OF PROSECUTION?

The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial.

This has been regarded as one of the most basic rights preserved by our Constitution. This right afforded us by the Sixth Amendment, has long been recognized to exist before the prosecution actually begins as well as one it has already commenced, and it is not limited, to neither one situation, the right necessarily being to limit the possibility of relative and depending upon the circumstances, its purpose being to limit the possibility that long and unnecessary delay will impair the ability of an accused to defendant to defend himself, see U.S. v. Ewell 1966,

86 S. Ct. 773, 383 U.S. 116, 120, 15 L. Ed. 2nd 627 **Beavers v. Haubert,** 1905 25 S. Ct. 573, 576, 198, U.S. 77, 87, 49 L. Ed. 950. **Pollard v. U.S.** 1957, 77 S. Ct. 481, 486, 352, U.S. 354, 351, 1 L. Ed. 2d.

In the case at hand, the testimony of Mr. Banks, uncontrovertibly reflects that the postal officers were notified of the alleged violations of the defendant-appellant, on or about July, 1966. That the defendant even though was moving rather often from one place to another always left behind a forwarding address which made him easy to track if the authorities had so desired.

However, it was not until about almost five years later, that the said authorities finally decided to finish their investigation and bring charges against the defendant-appellant. There is not a single iota of evidence in the record which tends to reflect that the authorities could not conduct their investigation and bring charges against the accused sooner than they did it, because of any fault of the defendant.

There is not attempt whatsoever on the part of the government to explain why this delay of almost five years actually happened.

Defendant submits that this unusually long delay requires the Court to conclude that since the government failed to show a good and reasonable reason for the same, it was tantamount to deprive the defendant of his rights to speedy trial, and therefore, to hold that it was error of the District Court to deny the defendant-appellants motion for a directed verdict of acquittal at the end of the government's case.

POINT III

THE DISTRICT COURT COMMITTED ERROR IN DENYING DEFENDANT - APPELLANT'S MOTION FOR DISMISSAL ON THE GROUNDS THAT A WARRANT FOR THE ARREST OF THE DEFENDANT WAS NEVER ISSUED.

Under Rule 9 of the Federal Rules of Criminal Procedure a warrant shall be issued for a defendant named in an indictment. Rule nine seeks to compliment the mandate of the Fourth Amendment to the Constitution.

The Mandate is one that shall not be taken lightly, and strict adherence must prevail. In the case at bar, no showing was made at all by the government that the warrant for the arrest of the defendant was ever issued, nor executed upon his person, at the time of the arrest.

It's considered that the arresting officer need not have a warrant in his possession, but must show it as soon as possible to the defendant. (**U.S. vs. Sailley**, C.A. 4th 1966, 360 F.2d, 699, 704).

Bristram v. U.S. C.A., 8th, 1958, 253 F.2d 610.

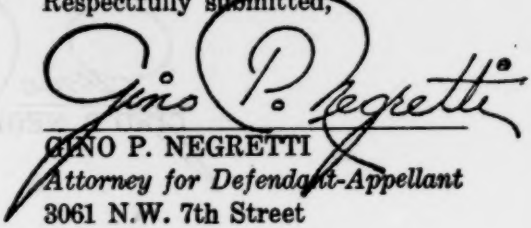
U.S. v. Pisaro, C.A., 7th 1951, 193 F.2d, 361 3 ALR 2d 409.

The reason for the rule is best exemplified by the case of defendants who are fugitives, and it will be unreasonable to expect any and all law enforcement officers looking for the accused to have a warrant in their possession. However, this isn't the case here, the arresting officer knew where to arrest the defendant and should have had a warrant with him, or otherwise showed him one once he was arrested, which he didn't do. Therefore the Court had no jurisdiction over defendant.

CONCLUSION

By reason of the above and foregoing Points of Law involved the defendant-appellant respectfully submits that the judgment and sentence of the 8th Circuit Court of Appeals be reversed, vacated and the case dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the above and Petition, was this 10th day of May, 1972, mailed to the SOLICITOR GENERAL, SUPREME COURT, Capitol Building, Washington, D.C.

GINO P. NEGRETTI